**IN THE HIGH COURT OF BOMBAY AT GOA**

**CRIMINAL APPEAL NO. 10 OF 2006**

M/s P. V. Constructions,
Through its Proprietor
Shri S. Venugopalan,
Nerul Goa. ... Appellant

versus

Shri K. J. Augusty,
Mapusa, Goa. ... Respondent

Mr. N. K. Sawaikar, Advocate for the Appellant.

Mr. J. P. Mulgaonkar, Advocate for the Respondent.

**CORAM : N. A. BRITTO, J.**

**DATE : 31ST AUGUST, 2006.**

**ORAL JUDGMENT**

This is complainant's appeal by special leave, against the acquittal of the accused, under Section 138 of the Negotiable Instruments Act, 1881.

2. The parties hereto are being referred to in their names as they appear in the cause title of the complaint.

3. The complainant is the proprietor of M/s. P. V. Constructions and the accused is the proprietor of M/s. Ayswarya Constructions.

4. The case of the complainant was that the complainant was undertaking execution of civil works directly or under other contractors and the complainant executed some works for the accused who is also a Civil Contractor towards which the accused owed to the complainant an amount of Rs.84,775/-. As per the complainant, through the intervention of mutual friends namely, (1) Mr. Balagopalan, Contractor, (2) Shri Caetano Colaco, Contractor, (3) Shri Luis, Contractor and (4) Joaquim Lobo, Junior Engineer in the Office of the Works Division XIII, P.W.D., Mapusa, it was agreed between the accused and the complainant that the accused would pay a sum of Rs.81,000/- in full and final settlement and accordingly the accused issued two cheques in favour of the complainant, one for Rs.40,000/-, post dated 25-3-2002 and the other for Rs.41,000/-, also post dated 25-4-2002 in the presence of S/Shri Balagopalan, Luis and Justin.

5. The complaint in this case pertained to cheque no. 804287 dated 25-3-2005. As per the complainant he deposited the said cheque for collection in his South Indian Bank Limited, Panaji Branch, which sent it to Federal Bank Ltd., Panaji Branch and the same was returned dishonoured with remark "payment stopped by the drawer" which was communicated to the complainant's bankers vide Memo dated 25-3-2002.

6. Further, the case of the complainant was that the complainant sent a demand notice, through his Advocate calling upon the accused to pay the said sum of Rs.40,000/- and the accused replied the said notice alleging that the said cheques were lost on 23-2-2002 and denied the issuance of the said cheques thus casting aspersions on the complainant and also denied his liability to pay the amount due. The complainant stated that the issue of cheques from the cheque book complained to be lost, reported to the Police was a fraudulent act on the part of the accused. The complainant therefore filed the complaint on 30-4-2002 and in support of the complaint examined himself and Vinu Kuriakose/PW2 who was working at the relevant time with the Federal Bank Ltd., Panaji.

7. The complainant in his affidavit in evidence reproduced the averments of the complaint and in cross-examination he stated that he knew the accused for the last 10 years and had become his friend for the last about 2 to 3 years and that both of them were from Kerala. The complainant denied that the accused had not issued any cheques to him or that the accused did not owe the complainant any amount but admitted that the accused in his reply to the statutory notice had in fact stated that the cheque book was lost on 23-2-2002 and that in the said reply it was also mentioned that the accused had lodged the complaint as regards the said cheque book along with other items on 23-2-2002. The complainant also admitted that in the said reply sent by the accused, the accused did mention that the accused had informed the Bank on 25-2-2002 that the cheque book of the accused was lost and that the payment for any cheque from the said cheque book should not be entertained. Vinu Kuriakose/PW2 confirmed that the suit cheque was of their branch and that when the cheque is presented to the Bank for realisation, they identify the signature on the cheque with the specimen signature of the person available with the Bank and it is passed for payment if there is balance in the account. A copy

of the card containing the specimen signature of the accused was produced by Kuriakose/PW2, with no objection from the accused. Kuriakose/PW2 also stated that on 25-3-2002 the accused was not having sufficient amount to honour the cheque. He also stated that it is possible for an account holder having a cheque facility to issue instructions to the Bank to stop payment on the cheque, before it is paid and admitted that their Bank had received the letter dated 25-2-2002 at 11.05 from the accused to stop the payment of the cheque and the said instruction was fed in the computer and since it was fed in the computer, if the cheque was presented, the same would not have been honoured. Kuriakose/PW2 again stated that to honour the cheque of Rs.40,000/- there was no sufficient balance in the account of the accused. In cross-examination by the accused, Kuriakose/PW2 produced copy of the letter dated 25-2-2002 addressed by the accused to the Manager of the Federal Bank Ltd., in which the accused had informed that cheques bearing Nos.804286 to 804300 were lost. A copy of the complaint made to the Police Inspector which accompanied the said letter dated 25-2-2002 addressed to the Bank was also got produced by the accused through Kuriakose/PW2.

8. The accused did not lead any evidence and in his statement recorded under Section 313 of the Code, the accused stated that he had lost the cheque book and therefore he had informed the Bank to stop the payment. The accused also stated that the signature on the suit cheque was not his and since he had not issued the cheque there was no need for him to keep sufficient balance in the account.

9. The learned Chief Judicial Magistrate, Panaji in acquitting the accused relied on the case of **Girish Kantappa Shetty** v. **State of Maharashtra**(2004 ALL MR(Cri) 1721) and observed that the accused having made serious allegations in the reply, it was surprising that the complainant had kept quite on the same. Observation made was with the view to disbelieve the complainant's version. The learned C.J.M. therefore drew an adverse inference against the complainant. The learned C.J.M. also held that the complainant had failed to examine the mutual friends before whom the amount due by the accused were settled and further held that the specimen signature card produced through Kuriakose/PW2 had not helped the complainant. The learned C.J.M. also took recourse to Section 73 of the Evidence

Act and compared the signature of the accused on the cheque in relation to the signature of the accused on the specimen card and other admitted signatures and came to the conclusion that the cheque was not signed by the accused and therefore proceeded to acquit the accused under Section 138 of the Act.

10. On behalf of the complainant, the learned Counsel Mr. Sawaikar has submitted that merely because the complainant had not rejoined to the reply sent by the accused to the statutory notice sent to the accused by the complainant, no adverse inference could have been drawn against the complainant. Mr. Sawaikar has further submitted that the learned C.J.M. has shifted the burden on the complainant when the accused had to discharge the burden which was on the accused to rebut the presumption which is available to the complainant in the light of various provisions of the Act. Mr. Sawaikar in support of the said submissions has placed reliance on the cases of **K. Bhaskaran** v. **Sankaran Vaidhyan Balan and another** ((1999) 7 SCC 510), **Hiten P. Dalal** v. **Bratindranath Banerjee** ((2001) 6 SCC 16), **K. N. Beena** v. **Muniyappan and another**

((2001) 8 SCC 458) and **R.R.Naidu** v. **Kolla S. Prasad** (2004(4) Crimes 295).

11. On the other hand, Mr. Mulgaonkar, the learned Counsel on behalf of the accused, has submitted that the complainant had not stated that the accused had issued post dated cheque in his statutory notice dated 8-4-2002 and it is for the first time that such a fact was stated by the complainant in his complaint as well as in his affidavit in evidence. Mr. Mulgaonkar has further submitted that the accused having taken a defence in his reply dated 12-4-2002, it was incumbent upon the complainant to have replied to the same and in this context Mr. Mulgaonkar has also placed reliance on the observations of this Court in the case of **Girish Kantappa Shetty** v. **State of Maharashtra**(supra) wherein this Court had observed thus:-

> "Failure on the part of the complainant to rejoin to the reply sent by the accused wherein the accused has specifically denied having issued the cheque and alleged that the cheques were stolen from his office and misused by

> the complainant would require adverse inference to be drawn against the complainant. When such serious allegations were made the natural reaction of the complainant would have been to vehemently deny that the cheques were stolen and forged and fabricated by him and to have sent a rejoinder threatening the accused with legal action".

12. Mr. Mulgaonkar, has further submitted that since the cheques bearing Nos.804286 to 804300 were lost by the accused on 23-2-2002, the accused could not have issued the cheque to the complainant dated 25-3-2002 and that from the very evidence produced by the complainant it could be sufficiently gathered that the suit cheque was one which was lost by the complainant and therefore the presumption arising in favour of the complainant was sufficiently rebutted by the accused.

13. I am unable to accept the submissions of learned Counsel Mr. Mulgaonkar. The Apex Court, in the case of **K. Bhaskaran** v. **Sankaran Vaidhyan Balan and another**(supra)has observed that when the signature of a cheque is admitted to be that of the accused, the presumption envisaged in Section 118 of

the Act could legally be inferred that the cheque was made or drawn for consideration on the date which the cheque bears. The Court also observed that Section 139 of the Act enjoins on the Court to presume that the holder of the cheque received it for the discharge of any debt or liability and the burden was on the accused to rebut the aforesaid presumption.

14. In the case of **Hiten P. Dalal** v. **Bratindranath Banerjee**(supra), the Hon'ble Supreme Court, speaking through three learned Judges, held that Sections 138 and 139 of the Act require that the Court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in **State of Madras** v. **A. Vaidyanatha Iyer(**AIR 1958 SC 61) it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused. Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the Court "may presume" a certain state of affairs. Presumptions are rules of evidence and

do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact. In other words, observed the Supreme Court, that provided the facts required to form the basis of a presumption of law exist, no discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving to the contrary. The Supreme Court also noted that the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the "prudent man".

15. In the case of **K. N. Beena** v. **Muniyappan and another**(supra) the Supreme Court, following the decision in the case of **Hiten P. Dalal** v. **Bratindranath Banerjee**(supra)

observed that "the High Court appears to have proceeded on the basis that the denials/averments in his reply dated 21-5-1993 were sufficient to shift the burden of proof on to the appellant/ complainant to prove that the cheque was issued for the debt or liability. This is an entirely erroneous approach. The first respondent had to prove in the trial, by leading cogent evidence, that there was no debt or liability. The first respondent not having led any evidence could not have been said to have discharged the burden cast on him. The first respondent not having discharged the burden of proving that the cheque was not issued for a debt or liability, the conviction as awarded by the Magistrate was correct. The High Court erroneously set aside that conviction".

16. Reverting to the facts of the case at hand, there was no dispute that both the complainant as well as the accused were contractors and as stated by the complainant and not denied by the accused, the complainant knew the accused for the last about 10 years and the accused had become his friend for the last 2 to 3 years. The complainant had also stated in evidence that an amount of Rs.84,775/- was due by the accused and that

with the intervention of mutual friends, whose names the complainant had spelt out in para 4 of his affidavit, had stated that the amount due was settled at Rs.81,000/- and these facts were also not seriously contested by the accused in the cross-examination of the complainant. The complainant had also stated that the cheques were issued by the accused and a suggestion that the suit cheque was not signed by the accused was denied by the complainant. Since the complainant had stated that the cheque was issued by the accused to the complainant it was for the accused to prove that the cheque which was issued by him indeed did not carry his signature and this could not be done only by a mere suggestion in the cross-examination of the complainant. The accused did state in his reply dated 12-4-2002 that the cheques were not signed by him but they bore the rubber stamp of the firm of the accused. The observations of this Court in **Girish Kantappa Shetty** v. **State of Maharashtra**(supra) in para 11 of the Judgment must be restricted to the facts of that case. In that case there were serious allegations made that the complainant had stolen the cheque and misused the same. There were no such allegations made by the accused in the reply dated 12-4-2002 and it was

certainly not expected of the complainant to have reacted to the said reply by sending another reply to the reply dated 12-4-2002. Any such effort would have been most unnecessary and unfruitful. The complainant rightly took the next step of filing the complaint. The complainant had stated that the accused had issued a post dated cheque. Absence of such a statement in the statutory notice, in my view, is of no special significance to the plea of the accused. The complainant had several presumptions in his favour and which were required to be raised by way of compulsion. True, the presumptions were rebuttable and could be rebutted by the very complainant's evidence on record or by leading independent evidence in rebuttal thereof. If complainant's evidence is bad and damages the credibility of the case of the complainant then that itself may be sufficient to rebut the presumptions available. But if that was not done and no evidence is led by the accused to rebut the presumptions then the Court is bound to treat the presumption as tantamounting to proof. In the light of the said presumptions it was certainly not necessary for the complainant to have examined any of the witnesses mentioned in para 5 of the affidavit in evidence to support the case of the complainant. On the contrary, in case the accused ever felt that

any of his cheques was lost and the complainant had forged his signature and presented the same to the Bank for payment, it is the accused who ought to have reacted much more strongly than by merely sending a written intimation to the Bank and to the Police Inspector, as done by him. A person whose signature was forged would not have remained quiet by merely stating that the cheques were lost. Adverse inference, if any, therefore had to be drawn against the accused and not against the complainant. If at all the accused lost any of the cheques, one fails to understand as to how, of all the persons in the world, it is the complainant who is a fellow contractor and a fellow Keralite with whom the complainant had dealings should have found the said cheque. No prudent man was expected to buy such a story. There was nothing improbable in the evidence given by the complainant and his evidence was further strengthened by the presumptions. The accused chose not to step in the witness box with a view to rebut the said presumption available to the complainant and in my view only because the complainant sent the said two letters dated 25-2-2002 to the Manager of Federal Bank Ltd., and on 23-2-2002 to the Police Inspector informing the loss of the cheque book it could not be said that the accused with the said letters had sufficiently rebutted the presumption available in favour of the complainant. It is to be noted that the accused also did not have sufficient balance into his account which is another circumstance which goes against

the accused. The case of the accused that he had lost the suit cheque along with the other cheque does not at all appear to be probable in the light of the evidence of the complainant which is fortified with the presumptions available to him under the Act. A reference to the case of **Goa Plast(P) Ltd** v. **Chico Ursula D'Souza**((2004) 2 SCC 235) would not be out of context. In this case, the Hon'ble Supreme Court has observed that "we see great force in the above submission because once the cheque is issued by the drawer a presumption under Section 139 must follow and merely because the drawer issues a notice to the drawee or to the bank for stoppage of the payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of a cheque in due course. The Supreme Court also referred to **M.M.T.C. Ltd.** v. **Medchl Chemicals and Pharma(P) Ltd.** ((2002) 1 SCC 234)and observed that "there is therefore no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents. This they have to discharge in the trial". The Apex Court also referred to the objects underlying Sections 138 and 139 of the Act and observed that the said Sections were enacted for proper and smooth functioning of all business transactions particularly, of cheques as instruments, primarily depends upon the integrity or honesty of the parties. The Court further observed that

in our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the Bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment enacted the aforesaid provisions. The remedy available in a Civil Court is a long-drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee".

17. It is to be noted that although by consent the specimen signature card of the accused was produced through Kuriakose/PW2 neither the complainant nor the accused elicited an opinion from Kuriakose/PW2 whether the signature of the accused on the cheque was that of the accused himself, compared with the signature on the said specimen signature card, which they could have done. Once the complainant had asserted that the cheque was given to him by the accused, duly signed, there was a presumption in favour of the complainant both in terms of Section 118 as

well as 139 of the Act and it was for the accused to lead evidence to the contrary to displace the presumption and in such a situation it was improper on the part of the learned Judicial Magistrate to have done the exercise by himself, of comparing the signatures and that too from a xerox copy.

18. In view of the above, the appeal deserves to succeed. The Judgment/Order of the learned C.J.M. acquitting the accused is hereby set aside and the accused is hereby convicted under Section 138 of the Act.

**N. A. BRITTO, J.**

**DATE : 20TH SEPTEMBER, 2006.**

19. The accused is hereby sentenced under Section 138 of the Act to undergo S. I. of one day(till rising of the Court) and pay compensation of Rs.60,000/- to the complainant in default to undergo S. I. for three months. The accused to surrender before the learned J.M.F.C. to undergo the said sentence, forthwith.

**N. A. BRITTO, J.**

**RD**